1

A jurisprudence of the limit

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Institutional and political developments since the end of the Cold War have led to a revival of public interest in questions of international law and cosmopolitan legality. This has intensified with the violent attacks on the US of 11 September 2001, and the use of force against the territory and people of Afghanistan and Iraq carried out in response. Many scholars in law and the humanities have embraced a cosmopolitan vision of the future of international law in answer to the sense of crisis which these events have precipitated.[1] Liberal international law is increasingly appealed to as offering a bulwark both against the threats posed by terrorists, religious militants, failed states, environmental degradation and epidemics, and against the excesses of the measures taken by states in response to these perceived threats. Commentators look to international law as a source of constraints on the abuses of hegemonic power, as a means of responding to the threats posed to the state by terrorism and economic globalization, or as a field in which economic justice and global co-operation should be on the agenda. The international is imagined, for good or ill, as a space outside the order imposed by independent sovereign states – a space in which law, the state and the subject all reach their limits.[2] The revival of interest in and anxiety about those limits is expressed in the appeal to international law and by reference to imperialism, terrorism, human rights and the state of exception.[3]

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[1] See for example Zygmunt Bauman, *Europe: An Unfinished Adventure* (Cambridge, 2004); Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, 2003); Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London, 2001).

[2] Mark F. N. Franke, *Global Limits: Immanuel Kant, International Relations, and Critique of World Politics* (Albany, NY, 2001).

[3] R. B. J. Walker, 'International, Imperial, Exceptional' in ELISE Collective Volume, *Counter-Terrorism: Implications for the Liberal State in Europe* (Brussels, 2005), pp. 36–57.

At the same time, the discipline of international law is itself undergoing one of its periodic crises, in which it attempts to renew itself and reassert its relevance.[4] Dramatic changes seem daily to be proposed to existing international institutions and to legal doctrines relating to sovereignty, territory, responsibility and the use of force. This renewed public interest in cosmopolitan legality, occurring at the same moment as a perceived crisis of relevance for existing international law and institutions, offers a valuable opportunity. The questions to which international law is expected to offer an answer are some of the most important, vital and intriguing questions of our time. Yet international law as a discipline has lost its capacity to provide a compelling understanding of what is at stake when these questions arise. This collection is part of a broader movement seeking to regenerate the exchange between international law and the humanities in order to restore the ability of international law to address such questions more fully. It brings together scholars working in a range of critical traditions to contribute to the generation of an understanding of the stakes of the turn to international law in today's political climate.

The chapters in this book complicate the tendency to see international law as offering an answer to the questions generated by the war on terror, globalization and related events. Rather than look to international law or institutions for answers or as the source of a pre-packaged programme of reforms which can solve the problems of domestic politics, these essays explore international law as a record of attempts to think about what happens at the limit of modern political organization. Responding to the questions posed of international law requires understanding the forms that global governance takes today, and 'how the world has come to take this form'.[5] International law offers an archive of attempts to address the questions and solve the problems that arise under the conditions of a modern politics organized around territorial sovereignty. It provides a valuable history of the ways in which a politics imagined as involving encounters between independent, sovereign entities and a commitment to cosmopolitan ideals has materialized through specific practices, institutions and relations. Many of the issues currently on the agenda of international institutional reform – terrorism, human rights violations, civilian immunity, security, states of emergency, the responsibility to protect,

[4] Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441.

[5] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London, 2004), p. 8.

peace-building – are about the point at which we reach the limits of modern political organization. By bringing together theorists working on these issues from the perspective of history, political theory, philosophy and international law, this book explores what the turn to international law might mean, and what the archive of international law offers as a way of understanding the stakes of this politics. These theorists remind us that the war on terror, attended as it is by a sense of 'threats, challenges and change', is not exceptional.[6] International law guards the secret history of a modernity which is itself terrorized by the lack of any sovereign authority to guarantee the law or make sense of death.

More specifically, this book is about the many forms of the relation to the other, as it is figured, performed, inscribed and imagined in the discipline of international law. To give this book the name *International Law and its Others* is immediately to invoke a critical project which has an established trajectory within international law. The well-versed reader of international legal texts, glancing at the title, might anticipate that this is a book which will describe and denounce the ways in which international law was complicit in, and founded upon, European imperialism. Such a book, being published as it is during an era of wars on terror, of development rounds at the World Trade Organization, of an institutional language of threats and challenges at the United Nations, might be relied upon to demonstrate the continuities between imperialism in its classical form and imperialism lite (or not so lite) in Iraq and elsewhere in the twenty-first century. Ideally, it might be expected that some of international law's 'others' will be invited to speak within these pages, to give the perspective of the 'native informant' on how the progress of international law should properly be measured, or to offer a description of what it is like to be an other of a law which imagines itself as international, even at times universal. There is a generous and liberal impulse within the mainstream of international law which wants the voice of the other to be heard, and which believes, in true cosmopolitan fashion, that we have now arrived at the moment when the truth of our history will finally be available to us. This book owes a great deal to this tradition of thinking critically about the need to reform international law to make it more inclusive and humane, and its authors take seriously the questions of responsibility that are posed by the history of imperialism.

[6] *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (2004).

Yet many of these chapters also depart from, and at times challenge, this mode of critical engagement. In particular, the authors writing here hesitate to name once and for all the inside and outside, the self and other of law, as if fearing that the other can only ever be represented by accommodating or assimilating it to existing economies, languages or practices. They attempt in a variety of ways to come to terms with the complicated and infinite process of constituting the self in relation to the other through the institutions of law and language. In these pages, sovereigns proliferate and take different forms, those addressed by the speech of law are figured and encountered in many ways, and the contingent and unstable meanings of legal texts are stabilized and take effect over the bodies and territories of those who are included in the community of international law only through their exclusion.[7] This sense of the fragmentary nature of critique is a product of the challenge that imperialism poses to history. As Gayatri Spivak writes, 'the epistemic story of imperialism is the story of a series of interruptions, a repeated tearing out of time that cannot be sutured'.[8] Writing about 'the other' after such a history can be one way of attempting to regain that which has been lost in the process. Yet, as Spivak adds, if 'we are driven by a nostalgia for lost origins, we too run the risk of effacing the "native" and stepping forth as "the real Caliban", of forgetting that he is a name in a play, an inaccessible blankness circumscribed by an interpretable text'.[9] It is the task of interpreting the texts of law, rather than attempting to access the blankness which they circumscribe, with which these chapters are engaged.

The themes which emerge from this book in terms of the relation between self and other include responsibility, desire and violence. Each of these themes addresses the conflict at the very interior of the subject, whether that subject be the liberal individual, the sovereign state or the discipline of international law. For one group of authors, the challenge posed by imperialism is to provide histories of the ways in which the other has been represented. They ask what has been done to the other who is figured in relation to sovereignty and imperialism. For a second group of authors, the 'other' of international law is that from which we set off or which we push away in order to constitute a subject, an institution or a tradition.[10] These chapters are concerned with how one might respond

[7] On the form of law which includes through exclusion, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998).

[8] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA, 1999), p. 208.

[9] *Ibid.*, p. 118. [10] *Ibid.*

to the call of the wholly other understood in this sense. There is a quality to international law as a discipline that brings some of the anxiety or the excitement involved in this question of responsibility into sharp relief. For some of the authors, there is something about this relation to the other from which they take pleasure, or which drives their work. They bring together fragments from disparate traditions or engage across idioms, writing about texts and ideas taken from worlds that would name themselves as theory on the one hand and practice on the other, and seeing how these texts open out when read together. Marjorie Garber describes the quality of this pleasure in terms of disciplinary libido. Garber says that this libido is that which keeps 'scholarly disciplines from becoming inert and settled'.[11] Each field differentiates itself but also desires to become its nearest neighbour, whether at the edges of the academy, among the disciplines, or within the disciplines. To quote David Kennedy, this is 'the disruptive edge of each discipline vibrating excitedly with the other'.[12] For others, this engagement with the other of law is also disturbing. Many of the chapters use the language of responsibility and ethics to develop the sense of the other as posing a question which the subject cannot answer. For scholars faced with the horrors of the war on terror, of detention of asylum-seekers, of suspension of law in the name of security or national interest, this sense of responsibility gives rise to an anxiety about the irrelevance of scholarship and the academic role. The terms in which we might once have thought about this academic responsibility are in flux. As Antony Anghie writes in his concluding chapter:

> The question of what role should be played by the scholar, or, more particularly, the international law scholar and adviser, is a very old and complex one. But, clearly, profound changes have occurred. The traditional divisions and debates, between 'realists' and 'pragmatists' and the 'crits', seem in retrospect to have been based on a curiously secure intellectual order, one in which, whatever the divisions, certain shared assumptions were maintained. The older verities that bound together the members of the 'invisible college of international lawyers', in Oscar Schachter's memorable phrase, no longer obtain.[13]

This sense of the relationship between 'older verities' and the grounds of critique can be seen in an earlier exchange between a sovereign and

[11] Marjorie Garber, *Academic Instincts* (Princeton, 2001), p. ix.

[12] David Kennedy, 'Law's Literature' in Marjorie Garber, Rebecca L. Walkowitz and Paul B. Franklin (eds.), *Field Work* (New York, 1996), pp. 207–13 at p. 212.

[13] Antony Anghie, 'On critique and the other', pp. 389–400 at p. 397 (reference omitted).

an errant philosopher. In the preface to *The Conflict of the Faculties*, Immanuel Kant cites a letter that he received from the King of Prussia, Friedrich Wilhelm, reproaching Kant for abusing his philosophy and deforming and debasing certain dogmas in his book, *Religion within the Limits of Reason Alone*. Wilhelm accused Kant of failing two responsibilities. The first was his 'inner responsibility and personal duty as a teacher of the young'. The second was his responsibility to 'the father of the land, to the sovereign, whose intentions are known to him and ought to define the law'.[14] Kant quoted from the letter as follows:

> You must recognize how irresponsibly you thus act against your duty as a teacher of the young and against our sovereign purposes, which you know well. Of you we require a most scrupulous account and expect, so as to avoid our highest displeasure, that in the future you will not fall into such error, but rather will, as befits your duty, put your reputation and talent to the better use of better realizing our sovereign purpose; failing this, you can expect unpleasant measures for your continuing obstinacy.[15]

Discussing this passage, Jacques Derrida comments:

> [T]he nostalgia that some of us may feel in the face of this situation perhaps derives from this value of responsibility: at least one could believe, at that time, that responsibility was to be taken – for something, and before some determinable someone. One could at least pretend to know whom one was addressing, and where to situate power; a debate on the topics of teaching, knowledge, and philosophy could at least be posed in terms of responsibility. The instances invoked – the State, the sovereign, the people, knowledge, action, truth, the university – held a place in discourse that was guaranteed, decidable, and in every sense of this word, 'representable' . . . Could we say as much today? Could we agree to debate together about the responsibility proper to the university?[16]

The institution of international law is intimately concerned with these notions of the State, the sovereign, the people, action and truth, and so repeatedly brings us up against the challenge which Derrida here articulates. These chapters explore the relations between the inside and the outside of the university, between the critic and the practitioner. They detail the hopes that generations of lawyers and scholars have had for their engagement with others – women, civilians, decision-makers, sovereigns,

[14] Jacques Derrida, 'Mochlos, or The Eyes of the Faculty' (trans. Richard Rand and Amy Wygant) in Jacques Derrida, *Eyes of the University* (Stanford, 2004), pp. 83–112 at p. 86.
[15] As quoted in *ibid.*, pp. 86–7 (translation notes omitted). [16] *Ibid.*, p. 87.

imperial administrators, indigenous peoples, savages, nature, power, history, masculinity and war. They detail the anxieties that lawyers have felt when their work seemed irrelevant to those outside the discipline or the academy. Throughout, they read the texts of international law as a concentrated and charged record of the ways in which scholars, bureaucrats, decision-makers and legal professionals write about relations to the other and about what happens at the limits of the spatial and temporal ordering upon which international law depends. The resulting exploration of the relation between critique, the other and responsibility offers a rich array of responses to the question of what it means to speak and write about international law in our time.

Part I: Sovereignty otherwise

> [W]e were still awaiting a response, as if such a response would help us not only think otherwise but also to read what we thought we had already read . . .[17]

One way in which a sense of international law as a jurisprudence of the limit emerges is through exploring the centrality of the conception of the sovereign state to the discipline. The chapters in Part I challenge the well-rehearsed disciplinary history of sovereignty, one of progress from religious absolutism to secular rationalism. The moment of secularization in these narratives is usually figured by the Peace of Westphalia in 1648. In this account, Westphalia marks a clean break between the social formations of Christendom and their successors – the sovereign independent states of modern times. According to international law, one of the essential elements of statehood is territorial sovereignty – the idea that within its territory 'supreme authority is vested in the state'.[18]

The idea that the medieval international system was transformed at a particular point in history into a system of modern sovereign states, each with an effective government exercising exclusive and absolute control over territory and people, is difficult to sustain when we look to those decisions of international arbitrators and tribunals concerned with competing claims to sovereignty over territory. The archive of empire offered by international law suggests the implausibility of a version of history in which a stable and uniform mode of political organization named the

[17] Jacques Derrida, *The Work of Mourning* (ed. Pascale-Anne Brault and Michael Naas, Chicago, 2001), p. 206.

[18] I. A. Shearer, *Starke's International Law* (11th ed., London, 1994), p. 144.

modern State emerged in 1648. The cases that develop the norms governing traditional modes of acquisition of territory reiterate the notion that the effectiveness of occupation as a mode of acquisition depends not only upon making known in a public, clear and precise manner the intention to consider a particular piece of earth as the territory of a sovereign, but that this must be accompanied by an effective exercise of control. International law, in an oft-cited formulation, does not 'reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations'.[19] This phrasing has become iconic in international legal doctrine, raising the question of how we might account for this compulsion repeatedly to invoke such a vision of sovereignty. While the reiteration of effective control in such decisions operates to support the ideal-type of the sovereign as all-powerful, effectively controlling territory and potentially able to kill, starve, exploit, imprison and subordinate those within it, the image of the European sovereign that emerges if we look at the facts grounding successful claims to territory in the texts of international law is a far smaller, more absurd and ridiculous figure. Paying attention to the record of what counted as a 'concrete manifestation' of control over territory reveals that 'effective control' often meant very little in practice. Europeans had to provide only limited evidence of control, often in the form of some kind of writing or speech, in order to be recognized as sovereign over a territory.[20] The declaration of a French lieutenant on board a commercial vessel cruising past an island in the Pacific that the island was owned by France and the publication of this declaration in a Hawaiian journal,[21] the signing of a contract on the part of Dutch East India company officials,[22] and the passing of legislation in relation to a territory,[23] have all been treated as relevant evidence of effective occupation. Only a powerful fantasy could support the use of such concrete manifestations of sovereignty to demonstrate that the sovereign state is a form of political organization which in fact depends upon exclusive

[19] *Island of Palmas Case (Netherlands* v. *United States)* (1928) 2 RIAA 829 at 839 ('*Island of Palmas Case*').

[20] In contrast, non-Europeans were rarely able to satisfy the demand that they manifest sovereign control. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005).

[21] *Clipperton Island Arbitration (Mexico* v. *France)* (1931) 2 RIAA 1105; translation in (1932) 26 *American Journal of International Law* 390.

[22] *Island of Palmas Case.*

[23] *Legal Status of Eastern Greenland (Norway* v. *Denmark)* (1933) PCIJ Rep (Ser. A/B) No. 53 ('*Eastern Greenland Case*').

jurisdiction over fixed territory and effective control over the inhabitants of that territory.

Recent accounts in political theory have also begun to complicate the history of modern politics as one in which the sovereign state emerged in Europe in the seventeenth century as a stable entity exercising control over territory and people.[24] Similarly, philosophers have begun to ask whether and how sovereignty makes sense as a concept across time and space, and whether there are alternative ways of imagining sovereignty that may have been lost in the rush to celebrate or bemoan the omnipotent sovereign of liberal imagination. The chapters in Part I draw on these contemporary developments in philosophy, legal history and political theory in order to think sovereignty otherwise. They put into play relations between sovereignty, speech, performance and flesh. For these authors, the critical project involves the strategic rewriting of histories of sovereignty. They put historical knowledge to work 'not to refute, but to eliminate and render impossible' particular theoretical and political strategies.[25] In so doing, each attempts to shift the focus 'on to something else which [offers us] more options, more places to go'.[26]

Costas Douzinas explores whether and how sovereignty – in its modern form as indivisible, unconditional and absolute – continues to make sense and take effect in the world. For Douzinas, this political form of sovereignty is under attack, an attack that is rather more to be feared than to be welcomed. His concern about the political effects of the retreat of sovereignty derives from an understanding of the ways in which sovereignty as a metaphysical concept relates to contemporary forms of political organization. Like Carl Schmitt, Douzinas sees the modern political form of sovereignty as a secularized version of a theological concept. However, unlike Schmitt, Douzinas understands this theological form of sovereignty as uncertain, and it is here that he finds room for optimism. This sense of the uncertain nature of theological sovereignty derives from a rigorous jurisprudential analysis of the foundations of that sovereign form. For Douzinas, sovereignty is the name given to the event of coming together or self-constitution of a community in and through jurisdiction,

[24] For example Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of International Relations* (London, 2004); Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extra-Territorial Violence in Early Modern Europe* (Princeton, 1994).

[25] Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France* (trans. David Macey, London, 2003), p. 98.

[26] Jacqueline Rose, *On Not Being Able to Sleep: Psychoanalysis and the Modern World* (London, 2004), p. 29.

the speaking of law. In the form of bare sovereignty, this coming together is a potentially infinite process. It involves a spatial ordering, a proper name, an institutional ordering and, in its democratic mode, a mutual address. This bare sovereignty is transformed into theological sovereignty through the inauguration of law through words. The law must be spoken in order to exist, and it is because this is so, 'because the law must have a mouth and a body', that the unique individuals and the great legislators 'enter the stage'.[27] Yet, while these legislators (or dictators) speak the law, they do so in the name of some 'silent partner for whom they speak, God, King, the People or Law'.[28] The particular and the universal are brought together through the saying of law. Here we see emerging the 'theologico-political form of sovereignty', the transformation of bare sovereignty into 'the definite figure of a Sovereign'.[29] This is the modern all-powerful sovereign feared or celebrated in much modern political philosophy, the sovereign who decides the exception, goes to war, abandons his subjects and annihilates his enemies. The secularization of sovereignty in modern democracies does nothing to render this figure any less terrible. While the One and Only God is no longer imagined as the source of sovereignty, the place of power does not remain empty – instead the 'people' are 'but one further link in the chain of substitutions of the metaphysical principle of the One'.[30] However, it is the space between the particular and the universal, bare and theological sovereignty, which for Douzinas offers hope, as it renders the 'particular claim to state a universal law . . . always an uncertain claim'.[31] It is because this claim can fail, because the particular and the universal can be seen as two moments which are not necessarily connected, that both violence and critique are possible.[32] Thus Douzinas might agree with Schmitt that 'whether the extreme exception can be banished from the world is not a juristic question',[33] and indeed both Douzinas and Schmitt seem to suggest that the modern constitutional attempt to eliminate the sovereign in this sense is doomed to failure. Yet Douzinas insists that this is not necessarily bad news – the bounded and uncertain claims of sovereignty are to be preferred to a politics of humanity with 'no foundation and no ends'.[34] He leaves us with the possibility of a political theology which gives some hope for the future. While the vision

[27] Costas Douzinas, 'Speaking law: on bare theological and cosmopolitan sovereignty', pp. 35–56 at pp. 43–4.
[28] *Ibid.*, p. 46. [29] *Ibid.*, p. 47. [30] *Ibid.*, p. 48. [31] *Ibid.*, p. 52. [32] *Ibid.*
[33] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab, Cambridge, MA, 1988), p. 7.
[34] Douzinas, 'Speaking law', p. 55.

of sovereignty which emerges in reading this chapter is not the theological sovereignty of the all-powerful, One and Only God, it is still graced by the divine. It resonates with the vision with which Jacques Derrida closes his meditation on the end of sovereignty:

> [W]herever the name of God would allow us to think something else, for example a vulnerable nonsovereignty, one that suffers and is divisible, one that is mortal even, capable of contradicting itself or repenting (a thought that is neither impossible nor without example), it would be a completely different story, perhaps even the story of a god who deconstructs himself.[35]

Ian Duncanson is also concerned to explore how the reiteration of an indivisible, all-powerful sovereign state which so dazzles, comforts, seduces and terrorizes might be resisted. For Duncanson, English legal and political history offers a secret history of sovereignty, one quite different to the Hobbesian conception of a world without Leviathan. In a close reading of the documents of post-Glorious Revolution England, which he admits is an unlikely place to begin to look for a peaceful account of the sovereign, Duncanson finds a version of sovereignty constrained by practices of politeness, education, manners, conversation and scepticism. This version of sovereignty was a hard-won response to the lessons learnt by the bourgeois English both from internal challenges (religious divisions and the threat of the newly politicized labouring poor) and from imperial misadventures (including in Ireland and later America). It was only with the imperial ambitions of the nineteenth century in India that the vision of sovereignty as absolute and omnipotent took hold. Later writers about law in the tradition of Bentham, Austin, Dicey and Hart forget the connection of the grandeur of sovereignty with what constituted its authority – the lesson taught by Locke, Shaftesbury, Hume and Burke. Thus Duncanson follows Benno Teschke in suggesting that we have been captured for too long by the myth of 1648. Duncanson spells out the implications of this rewriting of history for international lawyers currently faced with renewed claims about the priority of a certain vision of sovereignty as a basis for reformulations of international norms relating to use of force, the responsibility to protect and so on. Those jurists who continue to offer us the 'secular version of something like the Stuart constitution' serve 'the performative function, not only in academe, but in the media, politics and public life in general, of reducing the citizen to a subject at risk

[35] Jacques Derrida, *Rogues: Two Essays on Reason* (trans. Pascale-Anne Brault and Michael Naas, Stanford, 2005), p. 157.

of Hart's slaughterhouse'.[36] This suggests a different way to think about the responsibility of those writing about international relations – to the extent we write and behave 'as if' the sovereign were all-powerful, we participate in making it so. International lawyers memorialize a certain set of knowledges and practices, which place the sovereign state at the foreground of the law, and a certain group of actors as principal law-makers. In his lectures published as *Society Must Be Defended*, Michel Foucault explores the 'memorialization function' performed by the work of state historians, 'from the first Roman annalists until the late Middle Ages'.[37] Foucault suggests:

> The annalists' practice of permanently recording history also serves to reinforce power. It too is a sort of ritual of power; it shows that what sovereigns and kings do is never pointless, futile or petty, and never unworthy of being narrated. Everything they do can be, and deserves to be, spoken of and must be remembered in perpetuity, which means that the slightest deed or action of a king can and must be turned into a dazzling action and an exploit. At the same time, each of his decisions is inscribed in a sort of law for his subjects, and an obligation for his successors.[38]

Thus when international lawyers record the deeds, actions or decisions of sovereigns they in turn inscribe a 'sort of law' for subjects, as well as an obligation for those who are successors to the sovereigns of Europe. Duncanson's rewriting of English legal history suggests how international lawyers might approach this process of inscription differently, and shift the ways in which they represent the international.

The idea of changing the practice of inscription is taken up in the chapter by Dan Danielsen. Corporations, and mercantile entities before them, have disturbed and depended upon the categories of international law for centuries. Doctrines such as state responsibility – a regime for the protection and preservation of the private property of foreign investors in the face of upheavals such as decolonization, civil wars, revolutions or regime change – reveal the functional separation of politics and economics, which works to define the functions of a state over which the sovereign has exclusive jurisdiction. The functions of the state as they emerged in Europe were largely political, and the fundamental distinction between 'political possession of territory and economic ownership' meant that much of international law worked to ensure 'that even the *enemy's* property rights

[36] Ian Duncanson, 'Law as conversation', pp. 57–84 at p. 83.
[37] Foucault, *Society Must Be Defended*, p. 66. [38] *Ibid.*, p. 67.

were protected'.[39] Danielsen seeks to challenge the effects of this separation of the political from the economic. He points to the fact that, while international lawyers have long sought to account for the role played by corporations in global governance, international law has tended to treat such actors as subjects for regulation or as an influence on regulation. Yet international lawyers have not treated corporations as producers of law or as 'governance institutions', perhaps out of a desire to preserve the nation-state as uniquely sovereign. Danielsen argues that corporations in fact perform regulatory functions, that corporate governance laws have a quasi-constitutional status, and that international lawyers should begin to treat corporations as agents of law, rather than assuming that international or transnational law always emanates from the state. According to Danielsen, we need to 'map the decisions of corporate actors with the same attention, specificity and rigour that international lawyers and academics have applied to state activity'.[40] This mapping would produce a new kind of law and a new kind of sovereign – the corporation. Danielsen moves towards making corporate decision-makers responsible for their decisions and institutional planning by treating these practices as a source of law and thus potentially making them opposable and generalizable. His proposal that we map these actions, that we treat what these actors do as 'never unworthy of being narrated',[41] gives to their deeds a new weight.

The chapter by Connal Parsley is a reminder of the political stakes of this question of the writing of sovereignty. Parsley explores the performance of sovereignty through the acts of those who speak the law, by attending with great care to the meanings made of one sign across time and space. The sign is a thumbprint appearing on an administrative form, by which Topsy Kundrilba was found by an Australian judge to have consented to the removal of her son (aged seven years) by the Director of Native Affairs in 1956. The form was written in English (a language which Topsy Kundrilba did not speak) and spoke of her 'desire' that her son, 'a part European-blood, his father being a European', be 'educated and trained in accordance with accepted European standards'.[42] The litigation during which this sign was used again to mark the sovereignty of Anglo-Australia was one of an ongoing series of legal actions by which indigenous Australians

[39] Susan Buck-Morss, *Dreamworld and Catastrophe: The Passing of Mass Utopia in East and West* (Cambridge, 2002), p. 15.

[40] Dan Danielsen, 'Corporate power and global order', pp. 85–99 at p. 98.

[41] Foucault, *Society Must Be Defended*, p. 66.

[42] As quoted in Connal Parsley, 'Seasons in the abyss: reading the void in *Cubillo*', pp. 100–127 at p. 104.

have sought recognition of the harms done to the 'stolen generation' of children forcibly removed by the state.[43] Parsley reflects upon the refusal of the judge in this case, O'Loughlin J, to consider the non-documentary evidence suggesting that the thumbprint did not signify the will or consent of Topsy Kundrilba to the removal of her son. He argues that the decision by O'Loughlin J that the thumbprint signified consent, and his privileging of the consequent meaning of the form over oral evidence relating to the conditions surrounding the production of the form, is an emblematic instance of the performance of sovereignty. This performance depends upon the idea of a natural writing capable of conveying a full and perfect meaning, and upon an image of the sovereign subject who writes. The 'I' of the form of consent is its sovereign, or in the words of Shoshana Felman, 'the authority of the performative is nothing other than that of the first person'.[44] Parsley draws on the work of Giorgio Agamben and Jacques Derrida to argue that this invocation of a subject who writes erases the institutional conditions by which the form seeks to interpellate those it addresses. For Parsley, this erasure is emblematic of the logic of sovereignty. In the moment of decision, O'Loughlin J performs as sovereign by inscribing consent as a fact within his judgment, while at the same time refusing to acknowledge his responsibility in writing the facts of law and thus determining the fate of the indigenous claimants.[45] Yet, as Parsley shows, the law cannot ever fully secure its own interpretation. Like the thumbprint of Topsy Kundrilba, the judgment of O'Loughlin J is also 'broken from its context, engendering a new possibility'.[46] The world of speech we inhabit as lawyers or scholars opens out through the practices of reiteration, giving flesh to the words of others, often in community but also in the silence of our solitary reading (in the office, at a café, under the blanket). Our reading, no less than our writing, is bound up with the political theology of modern sovereignty.

[43] According to the *Bringing Them Home* report into this history, which was released in April 1997, 'between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal': see Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra, 1997), p. 37.

[44] Shoshana Felman, *The Scandal of the Speaking Body* (Stanford, 2003), p. 33.

[45] On the inability of law to understand itself as writing, see Nina Philadelphoff-Puren and Peter Rush, 'Fatal (F)laws: Law, Literature and Writing' (2003) 14 *Law and Critique* 191 at 202.

[46] Parsley, 'Seasons in the abyss', p. 101.

Part II: Human rights and other values

International law as a regime that recognizes certain kinds of actors as sovereign produces a world of legitimate violence which is territorially-bounded. International law, through the institutionalization of human rights, also produces the techniques by which the law attempts to mediate that violence. In the words of Rob Walker, '[c]laims about the sovereignty of states . . . replace the angels as a marker of the margins of human existence'.[47] It is the question of what happens at the margins that absorbs international human rights lawyers. International human rights law is the field in which international lawyers and others try to make sense of the ways that modern states grasp human life as a project and a problem. It is also the vehicle through which many lawyers and activists attempt to constrain the power exercised by states over the individuals within their territory or jurisdiction. The understanding of power which informs this legal tradition is largely that which Michel Foucault has described as juridical or sovereign power – power understood as a commodity held by a sovereign and dependent upon control over the earth and its products. Yet human rights law is increasingly resorted to as part of a struggle against the globalization of disciplinary or bio-power, a mechanism of power exercised through bodies and what they do. This is most visible in the engagement of the human rights community with the American treatment of detainees as part of the war on terror, and with the related detention of asylum-seekers in Australia as part of an Australian immigration control policy seeking to deter 'economic refugees'. In other words, lawyers invoke human rights when confronted with the fate of human beings who are abandoned by the law of the sovereign state – included as subjects of law only by being excluded from the community to which the law gives rise. The authors of the chapters in Part II ask whether human rights offer a mode of resistance for the subject – a way of resisting modernity's 'hounding of the subject beyond death, apparently without limit'[48] – or whether instead the invocation of human rights constrains our capacity to think about and counter the ways in which power circulates in this global politics and economy. They show that, in order to understand the place of international human rights law in the modern global political

[47] R. B. J. Walker, 'From International Relations to World Politics' in Joseph A. Camilleri, Anthony P. Jarvis and Albert J. Paolini (eds.), *The State in Transition: Reimagining Political Space* (Boulder, 1995), pp. 21–38 at p. 28.

[48] Joan Copjec, *Imagine There's No Woman: Ethics and Sublimation* (Cambridge, 2002), p. 47.

order, it is necessary to explore and reconfigure the historical relationship between human rights, economics and security.

The chapter by David Kennedy explores what happens when humanitarian values are successfully 'transformed into legal and institutional projects'.[49] Kennedy argues that American humanitarians find it difficult to acknowledge their participation in rulership, despite the fact that human rights as a vocabulary and a tool is now used not only by human rights activists and NGOs, but by militaries, corporations and trade lawyers. For Kennedy, one of the major challenges facing the human rights movement in the years ahead is to learn to be more 'responsible partners in governance' – coming to terms with the power that humanitarians now exercise and taking responsibility for the costs of that power.[50] Being attentive to the costs of human rights work requires focusing on its everyday routines rather than the more spectacular aspects of intervention, and facing squarely the choices that have to be made in the process of ruling or governing. Central to Kennedy's argument is the relationship between responsibility and pragmatic calculation. To be responsible means to 'become more pragmatic' and 'to acknowledge and take responsibility for the costs as well as the benefits of [our] work.'[51] Responsibility also requires accepting the limits to calculation and thus the freedom and power inherent in the moment of decision. According to Kennedy, human rights law offers a false promise that 'it knows what justice means, always and for everyone; all you need to do is adopt, implement and interpret these rights'.[52] Kennedy resists this vision of the decision-maker or ruler as implementer of a programme or the act of decision as merely the application of a law. He focuses instead on the freedom experienced by the decision-maker, as the subject who pre-exists the decision.[53] This is a subject who is 'capable of deciding, in its "thinking and reasoning" way, what s/he wants, and whether or not to conform to the rules laid down before it and for it' (or to know when there are no such rules).[54] For the decision-maker to do justice requires the exercise of human freedom – this in turn requires that he or she find space amongst rules and institutions

[49] David Kennedy, 'Reassessing international humanitarianism: the dark sides', pp. 131–55 at p. 131.

[50] *Ibid.*, p. 132. [51] *Ibid.* [52] *Ibid.*, p. 134.

[53] For an articulation of a different view, that 'it is through the decision that one becomes a subject who decides something' and that 'if there is a decision, it presupposes that the subject of the decision does not yet exist', see Jacques Derrida, 'Remarks on Deconstruction and Pragmatism' in Chantal Mouffe (ed.), *Deconstruction and Pragmatism* (London, 1996), pp. 77–88 at p. 84.

[54] Rachel Bowlby, *Shopping with Freud* (London, 1993), p. 82.

in which to discover 'opportunities for political engagement'.[55] Kennedy's closing paragraph conveys eloquently this vision of the relationship between freedom, responsibility and decision.

> There is freedom here – the freedom of discretion, of deciding in the exception, a human freedom of the will. It is at once pleasurable and terrifying. It entails responsibility to decide for others, causing consequences that elude our knowledge but not our power.[56]

My chapter also engages with the themes of responsibility and decision. While Kennedy calls for more pragmatism and for a clearer sense of the choices involved in the moment of decision, I argue that to decide is not simply to be outside the constraints of a pre-existing code or 'law as answer machine'.[57] Rather, at the moment of decision, the decision-maker is *both* bound by a code and called to respond to the wholly other. In other words, the decision-maker is 'not only fragmented but irretrievably split',[58] not just faced with 'a difficult and unsettling choice' but faced with 'an insoluble and paradoxical contradiction' between the demands of general accountability and absolute responsibility.[59] The chapter develops this idea through an exploration of the sacrificial tradition of thinking about responsibility. It begins with the biblical story of Abraham, of whom God demands that he offer his son Isaac as a sacrifice, and traces the meanings of this story for Christianity and for international politics.[60] Sacrificial responsibility involves a singular relationship with the absolute other. In the Christian tradition, this other is named God, but in the tradition of international economic law with which this chapter is concerned, we might name this other 'the Market'. Responsibility in this tradition describes the split relationship of an individual to the public world of universal principles, and to the unknown other to whose demands the individual must respond in secret. The madness of decision lies in this split between the need to hold universal principles, and the call to betray those principles in response to the sacrificial demand of

[55] Kennedy, 'Reassessing international humanitarianism', p. 151.

[56] *Ibid.*, p. 155.

[57] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004), p. 318.

[58] Jenny Edkins and Véronique Pin-Fat, 'The Subject of the Political' in Jenny Edkins, Nalini Persram and Véronique Pin-Fat, *Sovereignty and Subjectivity* (Boulder, 1999), pp. 1–18 at p. 1.

[59] Jacques Derrida, *The Gift of Death* (trans. David Wills, Chicago, 1995), p. 61.

[60] While a version of this story appears in the religions of Judaism, Islam and Christianity, I trace the Christian form of the story, with its strongly economic logic.

the absolute other. Responsibility in this sense involves a relationship to the other to whom we respond (or submit), to whom we are responsible. This 'form of involvement with the other . . . is a venture into absolute risk, beyond knowledge and certainty'.[61] This answer or responsibility is not something that can easily be generalized or universalized. When we respond to the other, we must betray all the other others while *at the same time* reaffirming the code which binds us to them. In making the decision to answer the call of the absolute other, we can only ever be responsible to the one who makes the demand. This chapter traces the ways in which WTO agreements structure this responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers.[62] It is the global market to whom the decision-maker must be responsible in this sense. This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.[63] WTO agreements require that the decision-maker imagine himself or herself in the position of Abraham, called to abandon public obligations (the familial tie to his son and wife for Abraham, the civic obligations to citizens and to values of transparency in the case of the decision-maker) to meet these demands of the market in the expectation of a reward in the future. This chapter asks: can such decision-makers be responsible (rather than simply 'accountable') to those they sacrifice in such an economy? Does the appeal to human rights or democratic governance offer a means of countering the demands of the market? Can the law repay the debts owed to those figures whose sacrifices remain outside the economy of risk and reward that these texts establish?

In her chapter, Judith Grbich takes up the concepts of sacrifice, abandonment and the fetish to pursue 'the processes of messianic economies which circulate as globalization and international finance law'.[64] Her writing opens up new possibilities and avenues for research into the relationship between human rights and trade, or blood and debt. This chapter is

[61] Derrida, *Gift of Death*, pp. 5–6.

[62] In thinking about international economic law as political theology, I am influenced by Jennifer Beard, 'Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology' (2003) 18 *Australian Feminist Law Journal* 27, and Judith E. Grbich, 'Aesthetics in Christian Juridico-Theological Tracts: The Wanderings of Faith and Nomos' (2000) 12 *International Journal for the Semiotics of Law* 351.

[63] On the reward of the righteous, see Matthew 10:34–40 (Revised Standard Version).

[64] Judith Grbich, 'Secrets of the fetish in international law's messianism', pp. 197–220 at p. 206.

part of a body of work in which Grbich explores the 'theological archive and the political economy archive' of European modernity.[65] Here, she builds on that work to develop a powerful enquiry into the futures of international law. Grbich argues that international lawyers are increasingly called upon to legitimize the excess of power.[66] It is in response to this impossible demand that some within the discipline have engaged with the messianic logic of international law, in an attempt to preserve 'some hope for a future'. Grbich uses this work as a starting point to begin to trace the intimate relationship between Christian forms of messianic thought and international law. In particular, Grbich attends to the poetics of international finance law, a key site for understanding the ways in which the image of other people's suffering has become linked in Western culture to 'the calculation of nation and value'. She suggests that, while she finds the work of Giorgio Agamben problematic, the intense sense of familiarity or uncanniness with which many readers respond to his theorization of abandonment comes in part from its relation to financial practices. The 'monied things of international finance law' are imagined as having authority to hold and measure financial entities, while the 'bare life' of the human being is banned from this domain, and 'abandoned to life at risk of death'.[67] Grbich draws on the linkage of the themes of abandoned being and of the 'secrets of the fetish' in the work of Jean-Luc Nancy,[68] to suggest ways in which we might understand the relationship between sovereignty, global monetary economics and bare life. Her engagement with the genealogies of fetish writings of Europeans in the sixteenth to nineteenth centuries builds on the work of William Pietz, who has attended to the material practices and economic logics which produced the European discourse on fetishism later taken up famously by Karl Marx and Sigmund Freud. According to Pietz, much European writing on fetishism forgets the 'economic explanation of fetishism found in the travel accounts that provided the factual evidence for Enlightenment

[65] Judith Grbich, 'The Problem of the Fetish in Law, History and Postcolonial Theory' (2003) 7 *Law Text Culture* 43 at 61. See also Judith Grbich, 'Tracing the Figure of the Native in Postcolonial Theory and Native Title Law: Enlightenment, Aesthetics and Charles Harpur' (2005) 22 *Australian Feminist Law Journal* 127 at 144, exploring the effects of the 'freezing of the symbolics of property and propriety in European aesthetic productions over the whole of the eighteenth and nineteenth centuries. The nineteenth century theorizing of law as separate from morals is almost the end of this cultural process, rather than its beginning.'

[66] Grbich, 'Secrets of the fetish', p. 197. [67] *Ibid.*, pp. 198, 218.

[68] Jean-Luc Nancy, 'The Two Secrets of the Fetish' (trans. Thomas C. Platt) (2001) 3 *Diacritics* 3.

theories of primitive religion'.[69] These travel accounts were part of a colonial practice of engagement between European traders and West African societies. One of the most authoritative texts on African fetishism for European intellectuals was written by a Dutch West Indies Company official and trader, Willem Bosman.[70] Bosman was '[v]ery much the intellectual offspring of Grotius' and a believer in 'the universality not of any religion but of the "Law of Nations"'.[71] Grbich reads Bosman's text, and the eighteenth-century Dutch travel genre more generally, as generating moral fables, through which metropolitan readers were able to resolve the discomfort experienced as a result of the shifting credit forms and money practices then emerging in the Dutch republic. The anxieties generated by these practices, and the uncertainties produced by the colonial encounters with peoples who valued material objects in different ways, were soothed through the generation of travel accounts which disavowed the spiritual practices of those characterized as outsiders and explained Dutch credit practices in the language of Christian atonement and sacrifice. For Grbich, these 'secrets of the fetish' are guarded by international financial law and international humanitarianism. She draws on the recent work of Nancy, Agamben and Taubes on fetishism, messianism and abandonment to suggest possible directions for critical theorists seeking to find within the messianic tradition of international law the resources to begin again.

The chapter by Florian Hoffmann offers a response to the critics of human rights. It is addressed to the human rights activist, a figure who is uncertain as to the ground from which action is possible. This figure stands in the midst of critique. On the one hand are the critics who say that the human rights movement is part of the problem, and when the activist looks at the occupation of Iraq or the intervention in Kosovo or the good governance agenda of the World Bank, he or she thinks, well, maybe the critics are right. On the other hand, the centrality of human rights is under attack as security becomes the new universal in international law, through which the subjects of international law must speak in order to articulate their needs, desires and interests, and as human rights are increasingly curtailed in the name of counter-terrorism. After the post-Wittgensteinian and poststructuralist challenges to the plausibility of universal rationality, the activist has no firm foundations on which to base the certainty that

[69] William Pietz, 'The Fetish of Civilization: Sacrificial Blood and Monetary Debt' in Peter Pels and Oscar Salemink (eds.), *Colonial Subjects: Essays on the Practical History of Anthropology* (Ann Arbor, 1999), pp. 53–81 at p. 60.

[70] *Ibid.* [71] *Ibid.*

human rights provides a justification for action. To all of this, Hoffmann replies – human rights can and should motivate action on behalf of such a person. Yet the activist cannot simply rely upon the accounts produced by human rights institutions and professionals, according to which human rights are legally valid, universal and indivisible. Nor can the activist seek to avoid the critical challenge to notions of universal rationality and the commensurability of language and culture. Hoffmann suggests that the pragmatism of Richard Rorty provides part of the answer. For Rorty, conversations about rights do not depend upon transcendent notions of truth, rationality and understanding. Rorty's famous liberal ironist is capable of at once using the language of rights as a tool or instrument while knowing that this language of rights, like all language, is contingent. The liberal ironist knows that his or her vocabulary of rights is fragile and always subject to redescription, yet reasons that, at this point in history, the best way to respond to this fragility and contingency is to support the liberal project of separating the public world of justice from the private world of self-creation, the right from the good, and, in the process, the liberal 'we' from a differentiated 'they'. It is on this latter point that Hoffmann departs from Rorty, suggesting that Rorty oversimplifies both the 'we' and the 'they', the self and the other. As a result, Rortyan pragmatism could only ground 'proactive, cross-cultural human rights activism' if it were based upon 'at least discursive, if not political or military hegemony'.[72] Hoffmann views the formalism of Martti Koskenniemi as offering another way through. Koskenniemi's invocation of a culture of formalism which allows for an empty universality suggests to Hoffmann that it is possible 'to take a position and argue proactively for it – within the formalist framework – while avoiding substantive fixation'.[73] Yet formalism can only offer a 'simulacrum for universality' by treating the 'particular language game of which it is made up' as a 'placeholder for an unattainable unity'.[74] For Hoffmann, then, it is possible to be active in the name of human rights only by recognizing that there is no objective foundation for action. This theory of human rights action accepts 'the multiple validities of human rights, and the singular validity of their promotion'.[75] Hoffmann thus leaves us to consider the conditions of possibility of the 'singular validity' of human rights promotion, and the related questions of the arrival of rights and the nature of the practices by which the facts about rights

[72] Florian F. Hoffmann, 'Human rights, the self and the other: reflections on a pragmatic theory of human rights', pp. 221–44 at p. 241.
[73] *Ibid.*, p. 243. [74] *Ibid.* [75] *Ibid.*, p. 226.

are 'found' or written.[76] In light of this, critical theorists might in future attend closely to the genealogy of these material practices which are the stuff of the human rights activist.

Part III: The relation to the other

The essays in Part III explore the impossible demands made of those addressed by international law in its civilizing mode, and the intimate quality of the encounter mediated by international law with those *figured* as other. In doing so, these chapters problematize the easy distinction between public and private championed by the liberal ironist discussed above. They show that international law is bound up with the creation of the modern subject, suggesting the undecidability of the public/private distinction.[77] Where '[t]o be at home . . . is to have an identity, one based on security and permanence that state-produced anxiety and the state-produced compensation for that anxiety have gone a long way in helping create',[78] these chapters make us wonder just who is at home in the world produced by civilizing missions and wars on terror. In addition, these chapters interrogate the stakes of the claim that law or critique respond to, or decide in the name of, the other. As Derrida writes:

> To take a decision in the name of the other in no way at all lightens my responsibility, on the contrary . . . my responsibility is *accused* by the fact that it is the other in the name of which I decide.[79]

For Liliana Obregón, like Connal Parsley, 'there *is* no identity, there is only identification or self-identification *as a process*'.[80] For Obregón, the identity in question is that of the 'community of civilized nations'. In the Latin America of the nineteenth century, becoming civilized, or completing civilization, was an ongoing process of identification with which international law was inextricably tied up. The destination of this becoming of the Creole élites of Latin America was a 'civilization' which was differentiated from 'Europe', yet still one of its proper heirs. Obregón evokes the longing of these élites to be recognized by their European counterparts, and the ways in which the *letrados* or men of letters who

[76] On the arrival of rights, see further Anne Orford, 'Human Rights After Faith' (2006) 7 *Melbourne Journal of International Law* 1.

[77] Derrida, 'Remarks on Deconstruction and Pragmatism', p. 79.

[78] Kristin Ross, *Fast Cars, Clean Bodies: Decolonization and the Reordering of French Culture* (Cambridge, MA, 1996), p. 107.

[79] Derrida, 'Remarks on Deconstruction and Pragmatism', p. 85.

[80] Jacques Derrida, 'Following Theory' in Michael Payne and John Schad (eds.), *life.after.theory* (London, 2003), pp. 1–51 at p. 25 (emphasis in original).

headed up the newly independent nations sought to complete civilization in part through participating in and producing international law. The post-independence Creoles sought to identify themselves both as autonomous from Europe, but 'at the same time they believed themselves to be righteous inheritors of a European legal, cultural and intellectual legacy'.[81] Obregón traces the 'will to civilization' expressed in the writing of publicists such as the Argentinian Carlos Calvo, the Peruvian Manuel Atanasio Fuentes and the Colombian José Maria Samper. These men struggled in quite different ways 'to participate and be identified as part of the civilized world'[82] through an engagement with international law. Her account suggests the ways in which Europe and North America worked as an imagined addressee of many of their writings, and the complicated and at times ambivalent ways in which Creole élites imagined their relations with their European counterparts. For Fuentes and Samper, European and US interventions in Latin America were to be rejected, while the models that Europe and the US offered for appropriating indigenous lands and remedying the nation's needs through laws and force were to be adopted. For Calvo, international law was not 'a foreign and distant model imposed by Europe, but rather . . . part of a legal heritage which connected them to Roman law, the backbone of the *jus gentium*, and thus to one of the factors that Europeans acknowledged as the origins of "civilization"'.[83] Her chapter offers a nuanced account of the ways in which fantasies of identity organized around civilization and barbarism accompanied the arrival of international law in Latin America.

Frédéric Mégret takes up the themes of civilization, barbarity and international law to explore a different set of nineteenth-century fantasies. Mégret suggests that many contemporary international humanitarian lawyers would argue that there is no outside to the laws of war, and that everyone is brought 'within its protective, hyper-inclusive mantle'.[84] This then generates a particular reading of situations where someone is excluded from the protection of international humanitarian law, such as the infamous treatment of prisoners at Guantánamo Bay denied prisoner of war status by their US captors. While some US lawyers have argued that these detainees are properly outside the protection of international humanitarian law, this has been responded to with outraged virtue by the

[81] Liliana Obregón, 'Completing civilization: Creole consciousness and international law in nineteenth-century Latin America', pp. 247–64 at p. 254.

[82] *Ibid.*, p. 257. [83] *Ibid.*, p. 263.

[84] Frédéric Mégret, 'From "savages" to "unlawful combatants": a postcolonial look at international humanitarian law's "other"', pp. 265–317 at p. 265.

rest of the international humanitarian law community. However, Mégret argues that the history of this area of law is grounded upon exclusion – the figure of an 'other' outside the law 'haunts the very beginnings and evolution of the laws of war'.[85] In a detailed survey of the genesis of the modern laws of war through to the contemporary era of the war on terror, Mégret traces the exclusion of non-Western peoples from the benefits and obligations the law was meant to offer. For Mégret, it should not be forgotten that the European attempt to 'grapple with the problem of violence in war' through codifying the laws of war to govern the disciplined troops of the nations of Europe took place at the same time that Europe was 'unleashing unprecedented violence outside its borders' in the scramble for Africa.[86] Early international humanitarian lawyers were colonialists who often defended the theoretical or practical exclusion of 'non-civilized' peoples from the laws of war. Mégret challenges the conventional narrative according to which international humanitarian law is making progress towards universal inclusion within the law's reach. The tradition of international humanitarian law remains 'necessarily both inclusive and exclusive', in that the attempt to define the categories of those who are protected 'is necessarily exclusive of something if it is to be inclusive of anything'.[87] Thus, according to Mégret, the US lawyers seeking to justify the exclusion of al Qaeda members from the protection of international humanitarian law are true to the letter (if not the spirit) of that tradition. Mégret suggests that we should read international humanitarian law not only as a practice that constrains and protects (though it plays an important role in doing so), but also as a practice that regulates, normalizes, disciplines and projects power. Through the project of regulating modern warfare, international law has legitimized a particular vision of what it is to be a combatant, what it is to be at war, and thus what it is to be a sovereign state. The laws of war project a fantasy about what it is to be a subject at war, and by forcing non-Western peoples to engage with that fantasy, work as 'instruments of forced socialization of non-Western nations into the international community'.[88]

The chapter by Dianne Otto also explores the ways in which the other has been represented in international law. Her chapter registers an aspect of the institutional moment in which international lawyers and feminist scholars might understand ourselves. This is a moment in which feminists

[85] *Ibid.*, p. 267. [86] *Ibid.*, p. 270.
[87] *Ibid.*, p. 304 (emphasis omitted). [88] *Ibid.*, p. 308.

are having an effect on the theorizing and practices of international law and international relations. Feminism, or at least a version of it, is institutionalized as part of the academic and bureaucratic life of international law in the twenty-first century. Yet, as Otto's chapter shows, this emergence of feminists as disciplinary players and policy-makers also produces anxiety and melancholy for feminists. Otto asks what it means to incorporate women into international law, if in so doing the subversive potential or erotic charge of differentiation that founded the desire to encounter the other is thus erased or domesticated? What happens when a feminist theory which sought persistently to put into question notions of sovereignty, authority, mastery and control now seems poised to transmit a new tradition for which it is (or may be) the sovereign authority? Did feminists mean to capture 'woman' and 'gender' as secure identities in suggestions for law reform? Otto focuses on the designation of woman as other in the texts of international human rights law, and traces the inscription of women within these texts from the earliest instruments of the League of Nations, shaped by the imperatives of colonialism and the priorities of domesticity and motherhood, through to the present era of instrumentalization of women's rights as special or universal human rights. She explores the ways in which feminist strategies have been employed over that time in attempts to realize the promise of human rights. Otto shows that in representing women, and later gender, international law has continued to exclude that which is outside its system of representation. Woman as other is only ever represented by assimilating her to existing economies and languages – as wife and mother in need of protection, as the woman who is 'formally equal' to man in public life, and as the victim subject in need of rescuing. These characters are haunting – they display 'an uncanny ability to survive, despite the best efforts of feminist legal strategists'.[89] Otto attempts to resist the reinscription of these gendered roles and the consequent domestication of feminism, yet with a sense of uncertainty about whether this is possible. How to recover that which is lost when Woman is secured in discourse? In the closing sections of the chapter, Otto slips the bonds of law, in a celebratory passage which recaptures the energy of a movement driven by eros, the desire to encounter the other. In those closing pages, identities multiply, new worlds are imagined in which 'the full range of sex/gender possibilities would be opened to all human beings as never before and the dualistic models of gender equality would

[89] Dianne Otto, 'Lost in translation: rescripting the sexed subjects of international human rights law', pp. 318–56 at p. 321.

be superseded'.[90] Yet law and institutions step back in – as Otto says, 'I am jumping too far ahead'. To reject gender at this point is to lose 'the conceptual tools that are necessary to make legal sense of the "gendered human rights facts" of the present'.[91] In the present tense of the law, the project of feminist disruption of the categories of human rights law 'has barely begun'.[92]

The naming of the mutilated woman as other in the texts of law is the subject of the chapter by Juliet Rogers. Rogers explores how and where we find the word of international law incarnated, and whose flesh sustains the fantasies of Western sovereignty. Rogers focuses on the unprecedented enthusiasm with which legislation prohibiting practices described as 'female genital mutilation' has been passed during the past two decades 'in countries we might now call the coalition of the "willing"'.[93] For Rogers, this laying down of law is an attempt to ally the anxiety that the Western subject feels when confronted with the presence of practices 'in dialogue with another Other'.[94] Such practices appear to point beyond the sovereign authority of the positive law which recognizes the subject as subject – they suggest 'the presence of another's law' within the Western state. 'Female genital mutilation suggests a limit to the sovereignty of the subject and thus calls into question his capacity for Being before the law and for articulating the symbolic as "truth"'.[95] If, as the chapter by Douzinas suggests, the initial secularization of power in Western democracies 'does not guarantee openness' and that instead 'the people' has come to signify 'one further link in the chain of substitutions of the metaphysical principle of the One',[96] then female genital mutilation threatens to break this chain. Female genital mutilation brings the other too close – it is a reminder of that which cannot be enclosed, of that which escapes positive law. The internationalization of female genital mutilation legislation – which Rogers refers to as an 'international franchise' – serves to reassure the Western subject of his relationship to a 'universal, all-encompassing Other'. In the words of the Permanent Court of International Justice, '[l]egislation is one of the most obvious forms of the exercise of sovereign power'.[97] The making of female genital mutilation is the kind of 'frenetic legislative activity' which 'attests to the desire for a Father or law-maker'.[98]

[90] *Ibid.*, p. 355. [91] *Ibid.* [92] *Ibid.*

[93] Juliet Rogers, 'Flesh made law: the economics of female genital mutilation legislation', pp. 357–86 at p. 357.

[94] *Ibid.*, p. 361. [95] *Ibid.* [96] Douzinas, 'Speaking law', p. 48.

[97] *Eastern Greenland Case* (1933) PCIJ Rep (Ser. A/B) No. 53 at 30.

[98] Costas Douzinas, *The End of Human Rights* (Oxford, 2000), p. 329.

The 'mutilated woman' who appears through this law-making is 'a collection of symptoms of the Western individual', and enables the reproduction 'in fantasy, of an ideal subjectivity of the "non-mutilated" subject'.[99] Yet this reconstituted sovereign authority will continue to be haunted by that which it pushes away to secure a self and a community – the reminder of 'another economy and a relationship with another Other'.[100]

Part IV: History's other actors

> We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.[101]

> This is the theatre where today's 'native informants' collectively attempt to make their own history as they act (in the most robust sense of agency) a part they have not chosen, in a script that has as its task to keep them silent and invisible.[102]

The chapters in Part IV speak to the questions of agency, responsibility and history invoked by the quotes above. The chapters engage with the anxious sense of simultaneous importance and irrelevance experienced on the part of international lawyers in the context of the unfolding war on terror, and the impossibility of determining where law's speech exists in relation to the border separating action from inaction.

In his chapter, Antony Anghie refers to the first of the quotes above, the now infamous statement made by one of the advisers to US President George W. Bush claiming that the US are 'history's actors'. In this vision, history's actors are its victors. To *act* is to dominate and conquer (or, at least, to liberate). Those who criticize such actions are purely reactive, left to study the realities brought into being by the creators of history. Yet what lies between 'reality' and the student or judge of that reality? What is it that 'all of you' will be left to study? This dismissive statement makes it seem that history is not written, but rather that it is simply a record of what was done (and perhaps said). The writer of history is not a writer. In contrast, Anghie argues that it is precisely this question of what it means

[99] Rogers, 'Flesh made law', p. 358. [100] *Ibid.*, p. 386.

[101] Unnamed senior adviser to US President Bush, as quoted in Ron Suskind, 'Without a Doubt', *New York Times Magazine*, 17 October 2004, p. 51.

[102] Spivak, *Critique of Postcolonial Reason*, p. 85.

to write critically that is shifting in the 'new reality' of the world post-11 September 2001. In a beautiful closing passage, Anghie invokes the affective power of the word in ways that offer a different understanding of the capacity of language to move us.

For Hilary Charlesworth and David Kennedy, these chapters raise the question of what difference international law makes, and how it makes difference. How does international law differentiate between itself and its others? What do we mean by international law when we ask that question? Where do we look to find the others of a law that imagines itself as universal? And how does international law participate in making difference(s), making a difference to the politics of our time? Rather than imagine ourselves as 'wise and sometimes heroic counsellors speaking truth/law to power', Charlesworth and Kennedy urge international lawyers and scholars to understand ourselves as 'active participants in intensely political and negotiable contexts' and to 'confront [the] responsibility' that this involves 'without sheltering behind the illusion of an impartial, objective, legal order'.[103] They focus on the invasion of Iraq as the event or the scandal that has put these questions of responsibility and relevance at the forefront of public debate in many parts of the world yet again. For Charlesworth and Kennedy, if the demand that international law reinvent itself and reassert its relevance is always posed in terms of its ability to perform as either a formal constraint on, or an instrument of, power, law will always be found wanting. Yet to analyse international law in these black and white, with us or against us terms paints a picture of international law that is limited and misleading. Instead, they suggest we should ask what difference did it make that the invasion of Iraq was widely criticized as a violation of international law? Why was there so little consideration of international law as productive – of how international law might have contributed to the production of Iraq as a country that was ripe for invasion? How we understand the difference that is made by internationalizing Iraq (and to a much lesser extent the US) remains an open question. It is at this point that the histories and the legacies of international law that are explored in these chapters offer rich lines of inquiry.

The world of international diplomacy and institutions has long been haunted by its inability to halt the march of events to their fated conclusion. The description by John Maynard Keynes of his experience as a

[103] Hilary Charlesworth and David Kennedy, 'Afterword: and forward – there remains so much we do not know', pp. 401–8 at pp. 407–8.

negotiator of the Treaty of Peace concluding World War 1 suggests that these anxieties are in fact nothing new:

> The proceedings of Paris all had this air of extraordinary importance and unimportance at the same time. The decisions seemed charged with consequences to the future of human society; yet the air whispered that the word was not flesh, that it was futile, insignificant, of no effect, dissociated from events; and one felt most strongly the impression . . . of events marching on to their fated conclusion uninfluenced and unaffected by the cerebrations of Statesmen in Council.[104]

International legal scholars fear a double displacement – if the 'cerebrations of Statesmen in Council' and their international legal advisers are no match for fate, the writings of critical scholars about these cerebrations seem even less so. Yet paradoxically it is the death and suffering which internationalism seems unable to prevent which also gives to international law the air of importance at the same time as suggesting its irrelevance. As Keynes reveals, central to this has been the scene of writing and its relationship to fate and death – 'the air whispered that the word was not flesh'. Maybe it should come as no surprise that the events of World War 1 and their challenge to the self-image of European civilization should also have been experienced by Keynes as a challenge to the Christian philosophy of reading – 'the idea of the Book that comes to life, of the letter that delivers its spirit by the action of a body'.[105] In the aftermath of this war, was it still possible to imagine the world in terms of 'a sort of human theatre where speech [*parole*] becomes action, takes possession of souls, leads bodies and gives rhythm to their walk'?[106] The contemporary anxiety about the capacity to understand international law in terms of its relationship to action might be read as one form of working through the 'accumulation of death' which marked the inter-war period of which Keynes writes, and which haunts this time of terror.[107] At stake in the disciplinary preoccupation with the relevance of the speech of international law to a world of war, blood, debt and suffering is this relationship between word and flesh. Should we understand the relationship between word and action only in terms of 'the letter that delivers its spirit by the

[104] John Maynard Keynes, 'The Economic Consequences of the Peace' in *The End of Laissez-Faire/The Economic Consequences of the Peace* (Amherst, 2004), pp. 47–298 at p. 56.

[105] Jacques Rancière, *The Flesh of Words, The Politics of Writing* (trans. Charlotte Mandell, Stanford, 2004), p. 72.

[106] *Ibid.*, p. 4.

[107] On the 'accumulation of death' in the inter-war period, see Rose, *On Not Being Able to Sleep*, p. 88.

action of a body'?[108] Should we measure the effectiveness of international law through its ability to move the powerful to action or constrain and regulate their behaviour? Is there any other way to think about 'the theatre of relationships between the text and what's outside, between writing and the politics it establishes'?[109] In the second of the quotes above, Gayatri Spivak offers a more chastened view of this 'theatre of relationships'. She reminds her readers of what it is to be an agent of history for many within a global system organized in the ways these chapters describe. She reminds us that history's actors may not have chosen their parts, and yet have to play them even as they attempt to make their own history.

Or should we understand legal scholars and their ilk to be the true actors of history, the masters of the word who, like Foucault's annalists, memorialize the characters of king and presidents and shape the worlds of their readers? In response to the imperialist as shaper of reality, it is tempting to posit the writer as master of the text of history. Yet, while the chapters gathered here argue that to write is to bear responsibility, this is not to say that we control the destiny of the texts which we author. This sense of the uncertain character of the address of law emerged from the closing session of the conference at which these papers were presented. This session saw a discussion of the striking proliferation of open letters to heads of state which marked the practice of international lawyers seeking to register public dissent about the invasion of Iraq. One such open letter to the British Prime Minister Tony Blair, published in the *Guardian* newspaper, later formed the basis of a reflective piece on critical practice and international law published in the aftermath of the invasion.[110] Those invited to sign this letter were affiliated with 'three elite universities – Cambridge, London, and Oxford'.[111] In the closing session of the conference, a lively debate ensued around this practice of letter-writing. Those scholars who positioned themselves as outsiders to the discipline of international law expressed their incredulity at the thought of writing letters to prime ministers or heads of state, and explained that they had a more tenuous relationship to power. Other critical international lawyers described their feeling of depression when these letters began to appear and circulate. They saw it as a major setback for the critical international legal project that the invasion of Iraq was popularly discussed as illegal (as if somehow law were not involved in producing 'Iraq the problem').

[108] Rancière, *Flesh of Words*, p. 72. [109] *Ibid.*, p. 129.

[110] Matthew Craven, Susan Marks, Gerry Simpson and Ralph Wilde, 'We Are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363.

[111] *Ibid.*, p. 370.

As the discussion evolved, the question of the addressees of such letters became more complicated. Indeed, one *reply* to the English letter came from a scholar at 'a "new" (former polytechnic) university in London', who wrote to its authors asking why those 'from a broader range of institutions were not asked to sign'.[112] To whom are our acts as speaking subjects of law addressed? How can we be sure?

It is this image of the open letter, and the complicated question of its addressees, with which I will conclude. Perhaps we might think of the writing of international law as an open letter, or a postcard, which sets off 'to travel the world without a father to guarantee the discourse, and will turn right and turn left without knowing to whom it should and should not speak'.[113] In *The Post Card*, Derrida explores this 'impossibility that a unique addressee ever be identified, or a destination either'.[114] It is this that makes speech 'the true realm of eroticism' (rather than a means of access to that realm). Although there is no destination and no addressee, we keep trying 'to touch each other with words'.[115] Law's speech and the words of the critic are on their way to an encounter that lies ahead. Their promise lies in the impossibility of knowing to whom they will speak upon their travels.

[112] *Ibid.* [113] Rancière, *Flesh of Words*, p. 92.

[114] Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (trans. Alan Bass, Chicago, 1987), p. 81.

[115] *Ibid.*, p. 56.

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